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Supreme Court of the United States

October Term, 1941

No. 605

WALLACE GROVES, PETITIONER

against

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER'S REPLY BRIEF

JAMES B. ALLEY,
Attorney for Petitioner

Of Counsel:
GEORGE Z. MEDALIE
LOUIS HAIMOFF

Supreme Court of the United States

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WALLACE GROVES, *Petitioner,* *against* UNITED STATES OF AMERICA, *Respondent.*	**No. 605**

PETITIONER'S REPLY BRIEF

While the terseness of the Government's brief is commendable, brevity has been achieved by omissions to consider the questions presented and the applicable authorities.

I

Proof of Devendorf Stock Fraud Essential to Conviction

It is true, as the Government suggests (Br., pp. 8, 9) that "conviction may be predicated upon any fraud charged in the indictment."

But it is precisely in such cases, where the conviction may be rested upon one of several frauds, and all are submitted to the jury, that all must be proved.

The Government has omitted to call to the Court's attention its recent recognition of this rule in *Warszower* v. *United States,* 312 U. S. 342 (1941) where this Court said, per Mr. Justice REED, at page 345:

> "As the trial court instructed the jury it might convict if any one of the statements charged in the indictment to be false was found false, it is necessary

> before affirmance is justified to decide whether there was adequate evidence to support the charge of falsity as to each of the statements."

Moreover, the Government has not advised the Court that the Circuit Court in this case adopted the same view in considering the appeal of George Groves. It said, per CLARK, *C. J.*:

> "But if it [the jury] could not find that he participated in both [frauds], his conviction must be reversed; for it was allowed, over objection, to consider his guilt in respect of each of the three frauds alleged, and hence each must be proven. *United States* v. *Smith,* 2 Cir., 112 F. 2d 83. See *United States* v. *Koch,* 2 Cir., 113 F. 2d 982, 984."

Assuming, therefore, but not conceding that the evidence established the charges relating to alleged appropriation of commissions, the necessity for proof of the preferred stock transaction remains.

II

The Question Presented Has Not Hitherto Been Passed Upon By This Court

The Government does not answer the question presented with respect to the effect of the undisclosed use for profit of inside information by a fiduciary by merely referring to the denial of certiorari in *U. S.* v. *Buckner,* 108 F(2d) 921, 309 U. S. 669, and *Shushan* v. *United States,* 117 F(2d) 110, certiorari denied, May 12, 1941, #912-913. *Leche* v. *U. S.* 118 F(2d) 246, now pending on petition for certiorari, is also cited.

It has been established in petitioner's main brief (pp. 18-24) that the *Buckner* case did not present the questions now submitted. The *Shushan* case involved the acceptance

of bribes by public officials, false representations made to a Board of Levee Commissioners and the false approval of a plan for refunding bonds. That case has nothing to do with the mere appropriation of corporate opportunities by fiduciaries.

Although the matter has previously been extensively treated (Pet. Br., pp. 15-37), it may be summarily restated. Petitioner's conviction here rests upon a breach of the equitable doctrine that fiduciaries "may not substitute themselves for the corporation any place along the line and divert possible benefits into their own pockets." (*Irving Trust Co.* v. *Deutsch*, 73 F(2d) 121, 124 (C. C. A. 2d) cert. den. 294 U. S. 708).

The Government's statement of the doctrine of this case is substantially the same. It urges that mail fraud is established wherever a fiduciary "derives a secret * profit from his fiduciary relationship at the expense of those whom he is supposed to serve" (Govt. Br., p. 10).

The charge here against Groves and Warriner is that they substituted themselves for General Investment Corporation in the purchase of stock from Devendorf and diverted the subsequent profit. This was a breach of their duty to the Corporation and a violation of "the ancient principle of equity which demands of a trustee undeviating loyalty to his beneficiary." †

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* The element of "secrecy" cannot be decisive since non-disclosure was the basis of the *equitable* liability in *Meinhard* v. *Salmon*, 249 N. Y. 458, 465, 466.

† This fundamental tenet of equity is, of course, the basis of the law of "corporate opportunity," as was pointed out in an exhaustive treatment of the subject in *Blaustein* v. *Pan-American Petroleum & Transport Co.*, 174 Misc. 601, 668 to 677 (N. Y. Sup. Ct.), per Mr. Justice ROSENMAN. (The quotation in the text appears at page 677.)

It has never previously been held that violation of this equitable doctrine is mail fraud. That question is presently pending before this Court for the first time.

III

There Was No Proof Either of Affirmative Misrepresentation or Non-disclosure

In suggesting that the foregoing question is academic, the Government (Br., p. 11) reiterates the statement in the Circuit Court's opinion to the effect that the representations made to Garver "were, of course, made for the purpose of being relayed by him to the board, * * *"

There was no evidence that Garver said anything to the directors (see Pet. Br., p. 43).

Moreover, it is stated by the Government (Br., p. 8) that the minutes did not disclose any recital by Warriner. This exposes the gap in the Government's proof. Neither do the minutes prove that Warriner did not make a disclosure. The minutes state that there was a "thorough discussion" (Pet. Br., p. 43). There is no evidence one way or the other as to the contents of this discussion or of the extent of Warriner's participation. The directors did not testify and the minutes are silent.

The Government therefore completely failed to prove not only affirmative misrepresentation, charged in the indictment, but the non-disclosure by a fiduciary, which was not alleged, and which is vital to the Government's case even on the theory adopted by the Circuit Court.

The Government begs the question when it contends (Br., pp. 10, 11) that Warriner's non-disclosure constitutes common law deceit, and therefore mail fraud.* There is necessarily an identical non-disclosure in every case of the *undisclosed* appropriation of a corporate opportunity or the *undisclosed* use of inside information for profit. Whether the conduct is described as non-disclosure by a fiduciary or the undisclosed appropriation of a corporate opportunity, the question remains, and is here presented, whether the conduct is mail fraud.

It is perfectly clear, moreover, that since non-disclosure was not charged, the conviction could not stand even if non-disclosure were proved; and if, when proved, it established the crime.

IV

Conflict of Decisions in the Circuits

Although it is categorically stated in the conclusion of Government's brief (p. 13) that there is no conflict of decisions, the Government makes no reference to the clear conflict upon the fundamental issue of whether mail fraud is common law deceit, between *Foshay* v. *U. S.*, 68 F(2d) 205, 211 (C. C. A. 8th) and the decision in this case (Petition, pp. 10, 11; Br., p. 16); nor does the Government advert to the conflict upon the same issue between the decision in this case and the "pre-suppositions" of *Durland* v. *U. S.*, 161 U. S. 306, and *U. S.* v. *Comyns*, 248 U. S. 349, which were pointed out by Learned HAND, *C. J.* in *U. S.* v. *Brown*, 79 F(2d) 321 (C. C. A. 2d); nor has the Government considered the decision of this Court in *Neal* v. *Clark*,

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* This contention, moreover, is, as has been demonstrated, an incorrect statement of the law (Pet. Br., pp. 37-39).

95 U. S. 704, where the Court adopted a definition of "fraud" squarely at odds with that stated by the Circuit Court here (Pet. Br., p. 24); nor is anything said of the conflict between the decision of this case and the decision in *Hass* v. *U. S.*, 93 F(2d) 427 (C. C. A. 8th) (Pet.. Br., p. 41).

Conclusion

The Government having failed to reply on the merits to the argument of petitioner, establishing the far-reaching public importance of the errors presented and the conflict of decisions thereon, the petition for certiorari should be granted as prayed for.

Respectfully submitted

JAMES B. ALLEY,
Attorney for Petitioner.

Of Counsel:

GEORGE Z. MEDALIE,
LOUIS HAIMOFF.